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502-748—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2063

NORMAN LUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 498 F. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1974. A petition for a writ of certiorari was filed on July 22, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entrapped into dealing in heroin under the due process standards of *United States* v. *Russell*, 411 U.S. 423.

STATEMENT

On July 27, 1972, a grand jury in the Northern District of California returned a seven-count indictment charging petitioner and two others, Young Ah Jen and Chung Hen Ho, with various narcotics offenses. Petitioner was named as a defendant in five counts. Count 1 alleged that petitioner and Young had conspired to import heroin into the United States, in violation of 21 U.S.C. 952. Count 6 alleged that petitioner had conspired with Ho to distribute heroin, in violation of 21 U.S.C. 841(a)(1). Counts 2, 3, and 7 alleged that petitioner had distributed heroin and possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). After a joint trial before a jury with co-defendant Ho,[1] petitioner was convicted on counts 1, 2, 3, and 7. The jury was unable to reach a verdict as to count 6.[2] Petitioner received concurrent sentences of ten years' imprisonment on each count. The court of appeals affirmed.

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[1] Young Ah Jen has remained outside the jurisdiction of United States law enforcement authorities.

[2] The jury acquitted co-defendant Ho on count 5, which charged him with having possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). The jury was unable to reach a verdict as to Ho's guilt or innocence under count 4, which also alleged that he had possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and count 6.

The evidence at trial showed that in November of 1971, petitioner, who operated a poultry market in Los Angeles, traveled to Hong Kong and met Young, a Hong Kong businessman (Tr. A. 4, 7–8, 12).[3] At that time, Young told petitioner that he could send petitioner some heroin after petitioner got back to the United States. Petitioner subsequently returned to California (Tr. B. 63).[4]

In Hong Kong on the morning of March 5, 1972, Young approached one Henry Monsen, a Norwegian ship broker and gold smuggler, and asked him to participate in a "regular weekly business" of smuggling narcotics from Hong Kong to San Francisco. Young proposed that Monsen carry the drugs to San Francisco, one kilo at a time. Monsen told Young that he would consider the offer, and the two parted (Tr. A. 2, 4, 6–7, 88–89).

Immediately after leaving Young, Monsen telephoned the United States Embassy in Hong Kong and spoke with Stewart Shostrom, an agent with the Bureau of Narcotics and Dangerous Drugs (B.N.D.D.). Monsen, who had no prior dealings with United States law enforcement officers, met with Agent Shostrom later that day and told him about his encounter with Young (Tr. A. 10–12). Shostrom asked Monsen to find out more about Young and his proposal (Tr. A. 195).

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[3] "Tr. A." refers to the seven-volume transcript of all proceedings at trial except the testimony of the defendants.

[4] "Tr. B." refers to the one-volume transcript of the defendants' testimony.

Monsen continued his negotiations with Young (Tr. A. 13). Young told Monsen that he had a "reliable receiver" in the United States who was willing to pay for drugs as soon as they were delivered (Tr. A. 17). When Monsen asked who the receiver was, Young told him that it was not necessary for him to know until the drugs were available for shipment (Tr. A. 19). Monsen agreed to transport the drugs to the United States for Young if Young obtained them from his source (Tr. A. 16).

Monsen maintained daily communication with both Young and Agent Shostrom (Tr. A. 13). Young experienced financial difficulties which delayed his procuring drugs. On April 24, 1972, Monsen informed Young that his Hong Kong tourist visa expired the next day and that he had to go to Formosa for a brief period to renew it. While in Formosa, Monsen learned that his name had been linked to gold smuggling in newspapers in Hong Kong, and he decided not to return there. He telephoned Agent Shostrom from Formosa and told him that he was going to San Francisco. Monsen flew to San Francisco on May 10, 1972 (Tr. A. 22-23, 165–166).

In San Francisco, Monsen received a letter from a friend in Hong Kong which stated that Young was looking for Monsen, that Young "could get the supplies from Bangkok," and that Young wanted Monsen to contact him (Tr. A. 24, 102–104). Monsen immediately telephoned the B.N.D.D. in San Francisco, and on May 26, 1972, he met with Agent Peter Niblo (Tr. A. 26). Monsen and Agent Niblo agreed that

rather than have Monsen return to Hong Kong and receive the drugs from Young, Agent Shostrom should contact Young and tell him that he was a friend of Monsen's and would take the drugs to the United States (Tr. A. 26–27).

On May 31, 1972, Agent Shostrom telephoned Young and told him that his name was "Ken Stewart" and that he was a friend of Monsen's who had recently arrived in Hong Kong. Shostrom told Young that Monsen wanted Young to telephone him in San Francisco and gave him Monsen's telephone number. Young asked Shostrom how he could reach him and Shostrom gave him an undercover telephone number in his Hong Kong office (Tr. A. 201–202).

Monsen telephoned Young from San Francisco and told him that Ken Stewart was an "alright fellow" who "could carry the deal of bringing the drugs into the United States." Young told Monsen that Stewart was acceptable, but that he "still had some financial troubles" (Tr. A. 33–34).

On June 5, 1972, Young telephoned Shostrom and asked him to "take a package" to Monsen in San Francisco. Shostrom said that he would (Tr. A. 205–206). Young and Shostrom met in Hong Kong on June 13, 1973 and agreed that Shostrom would sail for San Francisco with a package of heroin on June 16 (Tr. A. 208–209).

On the morning of June 16, Young telephoned Shostrom and told him that "the deal was off" and that they would do business at a later date. Shostrom responded that there would be no next time and that

he did not believe that Young could get drugs. The agent hung up before Young could reply (Tr. A. 210).

Later on June 16, Young telephoned Shostrom again and told him to have Monsen telephone petitioner in Los Angeles. Young gave Shostrom the telephone number of petitioner's poultry market and told him that after Monsen called petitioner, he would be able to deliver the heroin (Tr. A. 211). Young said that Monsen should give the code phrase "Young has just come from the airport" when he spoke with petitioner (Tr. A. 211–212, 245). Shostrom, by telephone, immediately reported this conversation to Agent Niblo in San Francisco (Tr. A. 211–212, 245).

In San Francisco, acting on instructions from Agent Niblo, Monsen telephoned petitioner's poultry market in Los Angeles (Tr. A. 37). Petitioner was not in, but Monsen left his number and petitioner soon returned his call (Tr. A. 38). Monsen told petitioner that "Young had just arrived on the airline," but petitioner gave no indication whether he recognized the code. Monsen told petitioner that his friend Stewart was scheduled to leave from Hong Kong the next day and that there was some "business" from Young for them to talk about. Petitioner indicated that he would talk to Monsen in Los Angeles and Monsen said that he would be there the next day (Tr. A. 40–41, 120–124; Govt. Ex. No. 2).[5]

[5] Two reels of tape (Government Exhibits, Numbers 1 and 2), containing telephone conversations to which Monsen was a party and which were recorded with his consent by federal agents, were received in evidence (Tr. A. 441–442).

After talking with petitioner, Monsen telephoned Young in Hong Kong and told him that since petitioner had agreed to meet with him, Young could dispatch Stewart with the drugs. Young told Monsen that when he met with petitioner he should tell him to "call his party in Hong Kong" (Tr. A. 43; Govt. Ex. No. 2).

In Hong Kong, Young delivered to agent Shostrom a package containing about 1 kilo of pure heroin, and Shostrom sailed for San Francisco on June 18, 1972 (Tr. A. 212–214, 219, 224, 302, 380).

Meanwhile, Monsen had gone to Los Angeles where, on June 17, 1972, he talked with petitioner at a Chinese restaurant which petitioner had suggested as a meeting place (Tr. A. 44–46; Govt. Ex. No. 1). When Monsen mentioned Young, petitioner said that he did not know Young or anyone else in Hong Kong. Later in their conversation, however, when Monsen (in accordance with Young's instruction) suggested that petitioner "contact his party in Hong Kong," petitioner said that he would. As Monsen and petitioner parted, petitioner offered to keep in touch and Monsen gave him his undercover telephone number at the B.N.D.D. in San Francisco (Tr. A. 47–49).

On June 20, 1972, Monsen learned from Agent Niblo that petitioner had been trying to reach him at the undercover number. Monsen immediately telephoned petitioner's poultry business in Los Angeles. The person who answered said that petitioner had taken the day off. When Monsen mentioned that he was calling from San Francisco, the person said, "Oh, San Fran-

cisco. I have a number * * *. You call him now." He gave Monsen another number in Los Angeles at which Monsen was able to reach petitioner a few moments later (Tr. A. 50–53; Govt. Ex. No. 2). Petitioner told Monsen that he had spoken with Young in Hong Kong* and that as a result he would come to San Francisco and talk with Monsen (Tr. A. 54; Govt. Ex. No. 2).

Petitioner telephoned Monsen on June 22, 1972, and told him that he was in Oakland. He told Monsen that he wanted to meet him at the corner of Broadway and Polk Streets in San Francisco (Tr. 54–55; Govt. Ex. No. 2). Petitioner picked up Monsen in his car at the specified location and they drove around for half an hour. Petitioner again stated that he had spoken with Young and asked Monsen "how much was coming" and when it would arrive. Monsen told petitioner that the drugs would arrive by ship about July 10 and that Young had merely told him that there would be "two units." Petitioner remarked to Monsen that he was acting as a "broker" and "would have to contact his people." Before he dropped off Monsen, petitioner told him that he had moved to Oakland for a month and would stay in contact (Tr. A. 55, 58–60, 141).

Monsen wrote Young on June 30, 1972, asking him "to clarify the prices and the cut up of profits." Young telephoned Monsen on July 5 and told him

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*A telephone company toll statement indicating that on June 20, 1972 a person-to-person telephone call was placed from petitioner's telephone in Los Angeles to a "Mr. Young" in Hong Kong was received in evidence (Tr. A. 370–373, 470).

to collect $7,000 from petitioner. Monsen was to keep $1,250, Stewart was to get $1,250 plus $700 for expenses, and the balance was to be forwarded to Young (Tr. A. 61–62).

On July 7, 1972, after learning that Agent Shostrom had reached San Francisco with the heroin, Monsen telephoned petitioner in Oakland and told him that the "goods had arrived." When Monsen told petitioner that Young wanted $7,000 for the drugs, petitioner said that he did not have that much money and would have to talk to his people. Petitioner told Monsen that he would call him at 10:00 p.m. (Tr. A. 64–65, 144, 148; Govt. Ex. No. 2).

Because of a mistake at the B.N.D.D. office in San Francisco, petitioner heard a recorded announcement that the number had been changed when he attempted to call Monsen back at the undercover number. When Monsen did not receive petitioner's call, he telephoned petitioner in Oakland (Tr. A. 253–254). Petitioner told Monsen that he had been trying unsuccessfully to reach him and that he wanted to see him that evening. They agreed to meet at Polk and Broadway at 11:00 p.m. (Tr. A. 65–66; Govt. Ex. No. 2).

Federal agents gave Monsen a black valise containing 10 grams of the heroin that Agent Shostrom had brought from Hong Kong mixed with more than 800 grams of soap powder, and Monsen proceeded to the appointed intersection, where petitioner picked him up in his car (Tr. A. 66–67, 254–255, 378–379). As they drove, Monsen told petitioner that the carrier was there and needed the money immediately and

that petitioner could pay $2,000 the next day (Saturday, July 8) and the balance on Monday. They agreed to meet at 1:00 p.m. the following day in Oakland at 7th and Alice Streets. Monsen kept the valise and its contents (Tr. A. 67–69).

The next day, July 8, 1972, petitioner picked up Monsen in his car at the designated time and place. Monsen handed petitioner the valise containing the soap and heroin mixture, and petitioner gave him $2,000 (Tr. A. 70–72). After dropping off Monsen, petitioner drove to his apartment at 81 Vernon Street in Oakland; he was followed by federal agents in a patrol car. The agents saw petitioner enter the residence carrying the valise, and they undertook a surveillance (Tr. A. 72, 258, 303).

Almost three hours later, the agents saw petitioner leave his apartment carrying a brown shopping bag and drive away. They followed him to co-defendant Ho's apartment at 728 Filbert Street in San Francisco. There the agents knocked on the door and when petitioner opened it, they placed him under arrest.[7] As the agents took petitioner into custody, they seized a small open packet containing heroin mixed with soap that lay on a nearby table (Tr. A. 259–267, 281, 384).

Later on July 8, the agents searched the premises at 728 Filbert and 81 Vernon pursuant to search warrants. At 728 Filbert they found a brown shopping bag containing a mixture of soap and heroin equal to

[7] Co-defendant Ho was arrested outside his apartment a few minutes later (Tr. A. 209).

about half of the quantity that Monsen had given petitioner earlier that day (Tr. A. 270, 301, 304–307, 388). At 81 Vernon the agents seized the black valise, the balance of the soap-heroin mixture, and a packet containing 8.6 grams of pure heroin (Tr. A. 329–341, 390–391).

Petitioner testified in his own behalf that when Monsen first told him that he had some business for him from Young, he had thought that Monsen was talking about bringing a Chinese opera to perform in the United States (Tr. B. 11). According to petitioner, when Monsen mentioned smuggling drugs, he told Monsen that he wanted no part of any illegal enterprise (Tr. B. 14). Petitioner testified that when he tried to call Young in Hong Kong to tell him not to send him any drugs, the person who answered told him that Young was not there, that the heroin had already been shipped, and that he had to buy it (Tr. B. 16–19). Petitioner further testified that he eventually purchased the heroin because Monsen looked like a gangster and he feared that Monsen might kill him (Tr. B. 22). He conceded, however, that Monsen never threatened him (Tr. B. 42). Petitioner admitted that after he received the heroin mixture from Monsen, he repackaged it in small envelopes which he intended to sell for $200 each. He also admitted that he had carried the heroin to Ho's apartment with the intention of selling some to Ho (Tr. B. 80–83). Petitioner claimed that the 8.6 grams of pure heroin that agents found in his apartment had been smuggled from Mexico by him exclusively for his personal use—which he

estimated at fourteen times a year.[8] He stated that he had smuggled heroin from Mexico—always for his own use—"three or four times" (Tr. B. 68–72).

ARGUMENT

Petitioner contends that his conviction should be reversed on the ground that he was a victim of entrapment by federal officers. He alleges that government agents initiated the heroin smuggling scheme and that their conduct was so outrageous that his conviction constituted a denial of due process under the standards of *United States* v. *Russell*, 411 U.S. 423, 430–432.

1. Petitioner's assertions notwithstanding, the heroin smuggling enterprise originated with him and Young—not with government agents. The smuggling ring had already been formed when law enforcement officers entered the picture. As detailed above, petitioner and Young had met in Hong Kong in November, 1971 and discussed the shipment of heroin to petitioner in the United States. The following March, Young approached Monsen, who at that time had no connection with the government, and asked him to participate in a "regular weekly business" of smuggling narcotics to this country from Hong Kong. Young told Monsen that he already had a "reliable receiver" in the United States whose identity he would not divulge before it was necessary. Eventually, of course, Young revealed that petitioner was that receiver.

[8] A government expert testified that 8.6 grams of pure heroin was enough for 170 typical individual daily doses of the drug (Tr. A. 417).

It was not until after Young had invited Monsen to participate in the smuggling operation that Monsen went to government agents and volunteered to cooperate with them. Monsen maintained contact with Young, who, despite financial difficulties, showed continuing eagerness for Monsen to transport drugs. When circumstances led Monsen to move to San Francisco, his participation in the ring seemed in doubt. However, Young kept Monsen in the operation by having word sent to Monsen that he could get drugs and that Monsen should contact him. Rather than have Monsen return to Hong Kong, Agent Shostrom, posing as Stewart, contacted Young in Hong Kong. At Young's request, Shostrom brought the heroin to San Francisco, where Monsen delivered it to petitioner.

In *United States* v. *Russell, supra,* this Court upheld a defendant's conviction for manufacturing illicit amphetamines even though an undercover government agent had provided an essential chemical ingredient. As the Court noted there, in order to obtain convictions where organized drug rings are involved, law enforcement officers must sometimes infiltrate the criminal organizations and participate to some extent in their unlawful activities. 411 U.S. at 432.

> Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly

> be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella* [v. *United States ex rel. Singleton*, 361 U.S. 234, 246]. [411 U.S. at 432.]

Here, as in *Russell*, the government agents provided something of value to the illegal entrepreneurs in order to infiltrate the drug ring. Specifically, the government furnished couriers to carry the heroin (which Young had obtained from his own source in Hong Kong) to petitioner in the United States for distribution. This Court stressed in *Russell* that although the chemical ingredient supplied by the government agent was scarce, the defendants could have obtained it from alternate sources and achieved their criminal purpose without the agent's assistance. Similarly, as the court of appeals held here, if Monsen and Shostrom had been unavailable, Young would simply have employed someone else to carry the heroin to petitioner (Pet. App. A, p. vi).

As noted, co-defendant Young, not Monsen or Shostrom, provided the heroin for petitioner. This contrasts with the situation in *United States* v. *Oquendo*, 490 F.2d 161 (C.A. 5), relied on by petitioner (Pet. 11), where it was alleged that a government informant was the source of heroin which the defendant was convicted of distributing.[9] Here, Monsen and Shostrom were mere conduits in transferring the heroin from

[9] Moreover, the decision in *Oquendo* was based upon the Fifth Circuit's earlier opinion in *United States* v. *Bueno*, 447 F.2d 903, which may well not be good law in light of this Court's opinion in *Russell*. See *United States* v. *Oquendo*, *supra*, 490 F.2d at 166–167 (Gee, J., concurring).

its illicit source to petitioner. Such conduct has repeatedly been recognized as a proper investigatory tactic. See, *e.g., United States* v. *Ortega,* 471 F.2d 1350 (C.A. 2), certiorari denied, 411 U.S. 948; *Chapman* v. *United States,* 443 F.2d 917 (C.A. 10); *United States* v. *Beckley,* 335 F.2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Davis,* 272 F.2d 149 (C.A. 7); *United States* v. *Sohnen,* 298 F. Supp. 51 (E.D.N.Y.).

In sum, "[t]he law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice', mandated by the Due Process Clause of the Fifth Amendment." *United States* v. *Russell, supra,* 411 U.S. at 432.

2. While petitioner purports only to raise the due process issue, implicit in his petition is a contention that he was entrapped as a matter of law under traditional standards, a claim which was rejected by the court of appeals (Pet. App. A, pp. iii–iv).

In determining whether a defendant has been entrapped, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States,* 356 U.S. 369, 372. Here, petitioner was not an innocent person whom Monsen led astray. Petitioner's initial hesitancy about doing business with Monsen apparently arose from his uncertainty as to whether Monsen was an actual narcotics smuggler, not from any reluctance to break the law. Moreover, the "principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime." *United States* v. *Russell, supra,* 411 U.S. at 433. Petitioner asserts that there

was no evidence from which the jury could infer such a predisposition on his part.[10] However, as the court of appeals held (Pet. App. A, p. iv), the record belies that contention.

Petitioner agreed to meet in Los Angeles with Monsen, a total stranger, after Monsen began a long distance telephone conversation with the seemingly bizarre remark that "Young has just arrived on the airline." At their Los Angeles meeting, petitioner proceeded circumspectly, since he was still uncertain whether Monsen was a genuine narcotics smuggler or an undercover government agent. However, when petitioner telephoned Young in Hong Kong, his doubts were allayed and his attitude towards Monsen changed markedly. Now he was eager to do business. Petitioner tried unsuccessfully to contact Monsen by telephone in San Francisco. When Monsen called back, petitioner had gone to the trouble of leaving another number where Monsen could reach him if he called. Petitioner told Monsen over the phone that he wanted to come to San Francisco and talk with him. Peti-

[10] The trial court instructed the jury (Tr. A. 850) in instructions approved by the court of appeals (Pet. App. A, pp. iii–iv, n. 1):

"The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.

"Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law-enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment."

tioner set up a meeting in San Francisco at which he eagerly asked Monsen how much heroin was coming and when it would arrive. Ultimately, petitioner agreed to pay the sizable sum of $7,000 and took delivery of the narcotics.

These were the actions of an experienced professional narcotics dealer—not those of an innocent citizen seduced into criminal activity. Once petitioner thought that he could trust Monsen, he joined enthusiastically in the conspiracy. At no time did petitioner tell Monsen that he wanted nothing more to do with him; neither did he go to the police.

Petitioner's predisposition to commit the offense was further demonstrated by the knowledgeable manner in which he packed the heroin in small envelopes for resale as soon as he received it. His admission that he previously had smuggled heroin "three or four times" was additional evidence of predisposition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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